

August 23, 2004

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0400332**

MICHAEL AND JULIE O'HARA

Code Enforcement Appeal

Location: 10325 Northeast 141st Place, Bothell

Appellants: **Michael and Julie O'Hara**
10321 Northeast 141st Place
Bothell, Washington 98011
Cellular: (425) 442-7580

King County: Department of Development and Environmental Services,
represented by **Brenda Wood** and **Elizabeth Deraitus**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 296-7092 and 296-7090
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Property Owner: **Edwin Bactad**
10325 Northeast 141st Place
Bothell, WA 98011

SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Appeal denied

EXAMINER PROCEEDINGS:

Hearing Opened:	August 19, 2004
Hearing Closed:	August 19, 2004

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. This is the story of a fence. The fence lies between 10321 Northeast 141st Place, owned by Michael and Julie O'Hara, and 10325 Northeast 141st Place owned by Edwin Bactad, Jr. The fence lies on the Bactad property just inside the property line. It appears to have replaced a smaller property line fence which was removed some time in 2003 by Michael O'Hara.
2. After a somewhat contentious exchange of emails between Mr. Bactad and Mr. O'Hara concerning the prior fence and its replacement, Mr. Bactad decided to construct a new fence inside the property line entirely at his own expense. The major portion of the fence appears to have been constructed in late 2003, with minor adjustments and finishing touches applied during the first half of 2004.
3. Mr. O'Hara does not like Mr. Bactad's fence. Within the blizzard of emails that have been generated over the past year regarding this controversy, Mr. O'Hara has complained that the fence is too long, too tall, asymmetrical, erratically framed and out of alignment. In short, the complaints against the fence mostly relate to its aesthetic impacts. Although there have been occasional disparaging comments about poor workmanship, there is no serious allegation that the fence is unstable or unsafe.
4. Section 106.2 of the 1997 Uniform Building Code exempts from building permit requirements "fences not over 6 feet (1829mm) high." An identical provision is found at Section 105.2 of the International Building Code, which went into effect in King County on July 1, 2004. Due to its 2003 construction date, Mr. Bactad's fence is governed by the 1997 Uniform Building Code.
5. In April 2004, Mr. O'Hara initiated a complaint with King County concerning the height of Mr. Bactad's fence. King County DDES made site investigations to view and measure the fence and, although portions of it exceed six feet in height, the DDES Code Enforcement Section determined that the fence was exempt from building permit requirements. The DDES staff position was summarized as follows in a May 21, 2004, email from Code Enforcement Supervisor, Elizabeth Deraitus, to Mr. O'Hara:

"Yes, we suggested you file the complaint so we could investigate it. Had the fence been 8-10' tall as you mentioned below, we would enforce against the height. However, that is not the case. You have already stated that you don't want dirt put under the fence because you are concerned about erosion. You have also stated the fence is unsightly. Enforcing the height restriction will not deal with these concerns of yours. The property owner has already stated that if he needs to bring the height into compliance he will do so by adding dirt to the base of the fence. So...to get him to comply will actually make the fence worse in your viewpoint even though it would then comply with code. Since the fence is only minimally over height, we do not chose (sic) to use our limited resources for the case. If you wish to appeal, we can accept the appeal via email."

By return email dated May 25, 2004, Mr. O'Hara appealed the DDES determination not to issue a notice and order citing Mr. Bactad for failure to get a building permit for his fence.

6. Mr. Bactad's fence is constructed of five sections of vertically aligned 1"x 6" cedar planks which extend laterally approximately 43 feet. Because the property slopes toward the street, the sections are stepped down to accommodate the grade change. The three sections furthest from the road are nearly identical to one another, each measuring 6 feet in plank height, 8 feet in lateral width and descending the slope in a relatively uniform pattern. The fourth section is about 6 feet wide, comprised of planks about 5 feet in height and is stepped down a greater distance from the previous sections due to a steeper gradient. Finally, the section nearest the street is both wider and shorter than the others, measuring about 13 feet in width and less than 4 feet in height. At the end of each section is a 4"x4" treated post anchored into the ground, and on the side of the fence facing Mr. O'Hara is a network of horizontal two-by-four supports.
7. In order to descend the slope toward the street while keeping the tops of the planks within each section level Mr. Bactad created a noticeable gap at the downslope end of each fence section. The most extreme occurrence is found at the lower end of the third section where there is about a 10-inch gap on Mr. O'Hara's side of the fence between the plank bottom and the adjacent terrain. In addition the fence posts extend above the line of plank tops another 3 inches or so, with the result that the 4 fence posts within the upper three sections all extend as much as 7 feet in height above the ground.
8. In order to reduce the finished height of the fence on the side facing his property, Mr. Bactad recently complied with DDES's suggestion to backfill the fence to reduce the gap between ground level and the bottom of the boards. Mr. O'Hara has declined to do the same on his side of the fence, and so the distances between ground level and the top of the fence quoted above now primarily apply to the structure as viewed from his property. Mr. Bactad would have preferred not to backfill his side of the fence in order to reduce the risk of the boards rotting from ground moisture. The amount of soils brought in and deposited by Mr. Bactad for backfilling are relatively small, well below the threshold requiring a grading permit. For regulatory purposes the backfilling done by Mr. Bactad does not constitute a berm.

CONCLUSIONS:

1. KCC 23.36.010A allows an aggrieved complainant to appeal a department's determination not to issue a notice and order for an alleged code violation. DDES accepted Mr. O'Hara's May 25, 2004, email as a complainant appeal.
2. The pre-hearing order issued by the King County Hearing Examiner's Office on July 15, 2004, defined the issues within Mr. O'Hara's appeal as involving whether Mr. Bactad constructed his fence illegally without a building permit, how the six foot fence height measurement is to be made, and whether DDES has discretion to decline to pursue code violations which it determines to be *de minimis*.

3. The Uniform Building Code creates an exemption from building permit requirements for fences that do not exceed six feet in height but is silent as to how that six-foot measurement is to be applied. UBC Section 104.2.1 authorizes DDES officials to “have the power to render interpretations of this code...in conformance with the intent and purpose of this code.” UBC Section 101.2 states that the purpose of the code is to “provide minimum standards to safeguard life or limb, health, property and public welfare” by regulating design, construction, materials, use, occupancy, location and maintenance. The record provides no basis for concluding that a fence that slightly exceeds six feet creates any risk to life or limb, health, property or the public welfare. As noted above, the issues of concern to Mr. O'Hara are primarily aesthetic, and the Uniform Building Code makes no attempt to regulate aesthetics.
4. In defense of its practice not to pursue as code violations fences built without permits slightly exceeding six feet in height, the DDES staff report asserts that “historically fences are measured from the builders side, and we have always accepted fill for plants after construction of the fence.” In addition, staff testimony indicated that DDES practice has been not to apply fence height measurements based on the fence posts but rather to focus on the lengths of the slats. Further, allowing some bottom clearance to avoid wood rot and to accommodate creation of level fence sections provides another legitimate reason to tolerate some latitude as to fence height. The evidence of record is that none of Mr. Bactad's fence planks exceeds six feet in length, and the extra height above grades does not exceed the amount needed to traverse a slope and to provide an element of ground clearance.
5. Staff's practice of determining fence heights based on the measurement of ground clearance at the midpoint of the fence section is consistent with zoning code provisions for measuring the height of structures based on average finished grade. According to KCC 21A.12.050C the average finished grade of a building is determined by averaging the ground elevations measured at the midpoint of each side of the rectangle enclosing the building footprint.
6. KCC 21A.14.220 deals specifically with the height of fences located on rockeries, retaining walls or berms. While not directly applicable to Mr. Bactad's property because there is no berm, retaining wall or rockery present, this code section is nonetheless instructive because it envisions a fence measurement based on the structural height, not on the ground level height. According to KCC 21A.14.220A, within residential zones a six-foot fence may be placed atop a four-foot rockery, retaining wall or berm consistent with zoning requirements. The significance of this provision is underscored by a similar reference to UBC Section 106.2, which not only exempts from building permit requirements fences that are six feet tall but also retaining walls that are not over four feet tall. Thus, under the exemptions provided at UBC 106.2, Mr. Bactad without a building permit could have built a four-feet high retaining wall and placed upon it a six-foot high fence for a total height of ten feet above ground level. This fact argues against a strict requirement to take enforcement action against a six-foot high fence based on an additional few inches of ground clearance. As long as the fence sections themselves are composed of planks no greater than six feet in length, it was a reasonable interpretation of the building code by DDES to provide modest latitude for additional ground clearance and fence top leveling without triggering mandatory building permit requirements.

7. In summary, the Uniform Building Code provides no direct guidance for interpreting the building permit exemption for fences not over six feet high. But in view of the fact that Section 106.2 allows both a fence six feet high plus a four-foot retaining wall beneath the fence to be exempt from building permit requirements, it was a reasonable exercise of the building official's code interpretation authority under Section 104.2.1 to accord a six-foot fence some additional latitude for ground clearance and to compensate for gradient changes. Mr. Bactad's fence is therefore not in violation of the Uniform Building Code permitting requirements, and Mr. O'Hara's complainant appeal must be denied.

DECISION:

The appeal of Michael O'Hara is DENIED.

ORDERED this 23rd day of August, 2004.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 23rd day of August, to the parties and interested persons of record:

Edwin Bactad
10325 NE 141st Pl.
Bothell WA 98011

Michael & Julie O'Hara
10321 NE 141st Pl.
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NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE AUGUST 19, 2004, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0400332.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Brenda Wood and Elizabeth Deraitus, representing the Department; and Michael and Julie O'Hara, the Appellants; and Edwin Bactad, the property owner.

The following Exhibits were offered and entered into the record:

- Exhibit No. 1 DDES exhibit packet for E0400332
- Exhibit No. 2 Exhibit packet submitted by Michael O'Hara
- Exhibit No. 3 Exhibit packet submitted by Edwin Bactad
- Exhibit No. 4 Copies of color photographs (6) with attached code sections and dictionary passages
- Exhibit No. 5 Copy of email from Elizabeth Deraitus to Joe Miles and Stephanie Warden, dated 5/26/04
- Exhibit No. 6 Code passages

SLS:ms
E0400332 RPT